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IN THE

Supreme Court of the United States

OCTOBER TERM, 2000

ROBIN LOVITT,

Petitioner,

v.

COMMONWEALTH OF VIRGINIA,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Virginia

REPLY BRIEF

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INTRODUCTION

There is no dispute that this petition presents the important and recurring question of federal law whether juries may consider evidence of other unadjudicated crimes in sentencing people to death, even when the government has met no burden of proof with respect to such evidence. Instead, the Commonwealth purports to argue that there is no split of authority on this issue. Its argument, however, is that the cases that disagree with the decision below do not cite the precedents the Commonwealth believes to be controlling. *See* Section I, below. The Commonwealth's contention therefore boils down to a *merits* argument that not only is wrong, but also underscores the need for this Court to reconcile its precedents, including the inapposite cases now relied upon by the Commonwealth. *See* Section II, below. Since there is no question that the state supreme courts are in conflict, and the question is properly presented on the record in this case, the Court should grant *certiorari* to resolve it now, before others are sentenced to death in this manner. *See* Section III, below.

I. THE COMMONWEALTH ALL BUT CONCEDES THAT THE STATE SUPREME COURTS ARE DIVIDED ON THIS IMPORTANT QUESTION OF FEDERAL LAW.

The Commonwealth asserts that "Lovitt's 'conflict' argument does not bear much discussion." Opp. 17. Mr. Lovitt agrees, given that the Supreme Court of Virginia has already acknowledged the "split of authority" on this issue. *Stockton v. Commonwealth*, 402 S.E.2d 196, 206 (Va. 1991). The Commonwealth nonetheless claims that the state supreme courts that conflict with the Supreme Court of Virginia "cannot represent any kind of 'conflict' worthy of certiorari review when they do not even recognize this Court's controlling precedent on the matter." Opp. 17. Of course, this is just a merits argument. The Commonwealth is not denying the conflict in holdings, it is just arguing that the other courts are wrong. (They are not, as explained in Section II , below.)

The Commonwealth also attempts to distinguish some – but by no means all – of the cases that split from the Supreme Court of Virginia's holding. By doing so, the Commonwealth only underscores its implicit concession that the cases it does not attempt to distinguish are in conflict with the decision below. (Those cases are *State v. Bartholemew*, 683 P.2d 1079 (Wash. 1984), and *Cook v. State*, 369 So. 2d 1251 (Ala. 1978).) Moreover, its attempts to distinguish the other cases make little sense. For example, the Commonwealth claims that *State v. McCormick*, 397 N.E.2d 276 (Ind. 1979), "cannot be considered as a true 'conflict'" because "the Indiana court was unwilling to allow . . . 'trials within trials' to occur" as a matter of federal constitutional law. Opp. 17. That point applies with equal force to this case, where the Commonwealth forced Mr. Lovitt to defend himself against numerous other charges.

The Commonwealth also claims, without citation, that cases from "Utah, California and Louisiana" are distinguishable because they "turn mostly on the statutory scheme of each particular State: aggravating factors must be proven beyond a reasonable doubt; unadjudicated conduct is an aggravating factor; thus, the unadjudicated conduct must be proven beyond a reasonable doubt." Opp. 17-18. Not so. In Louisiana, for example, there is no "unadjudicated crimes" aggravating factor, *see* La. Code Crim. Proc. art. 905.4.A; instead, the government sought to introduce the evidence as general "character and propensity evidence" – just as the Commonwealth used such evidence in Mr. Lovitt's trial as evidence of dangerous character. *See State v. Brooks*, 541 So. 2d 801, 811 (La. 1989) (citing La. Code Crim. Proc. art. 905.2). Similarly, prior crimes are considered aggravating circumstances in California and Utah only if the defendant has been *convicted* of those crimes. *See* Cal. Penal Code § 190.2; Utah Code § 76-5-202. The cases from these states are indistinguishable from, and in square conflict with, the decision below.

In an attempt to minimize this conflict, the Commonwealth claims that Mr. Lovitt "mischaracterizes the law" of Virginia

by stating that "evidence of unadjudicated conduct is '*per se*' admissible" under Virginia law. Opp. 13. The Commonwealth goes on to assert that "[o]f course this is not the case" because "evidence is admissible only if it is relevant and the test for admissibility is whether the legitimate probative value outweighs the incidental prejudice to the accused." *Id.* (internal quotation omitted). But the Commonwealth neglects to point out that the Supreme Court of Virginia has repeatedly held that evidence of unadjudicated conduct satisfies this standard as a matter of law. As that court has explained, "in *Beaver v. Commonwealth*, [352 S.E.2d 342 (Va. 1987)], we rejected a contention that evidence of unadjudicated criminal activity is 'not reliable.' And in *Gray v. Commonwealth*, [356 S.E.2d 157 (Va. 1987)], we rejected an argument that such evidence is 'highly inflammatory and inherently prejudicial.'" *Stockton*, 402 S.E.2d at 210 (affirming death sentence for this reason). The Commonwealth's citation of *Beaver* as standing for the contrary position, *see* Opp. 19, is mystifying. There is no question that the state supreme courts are divided, and that the Commonwealth has adopted an extreme rule of *per se* admissibility that most jurisdictions have rejected. *See* Pet. 9.

The federal courts of appeals are also divided. The Commonwealth does not even attempt to reconcile the decisions of the various circuits. Instead, it asserts that the Ninth Circuit's "indicia of reliability" requirement is irrelevant because it "is an *admissibility* concern, not a 'burden of proof' standard." Opp. 18 (emphasis added). That is no distinction at all, given that Mr. Lovitt has always argued that such evidence is inadmissible. *See* Pet. 16-20.

II. THE COMMONWEALTH'S INCORRECT MERITS ARGUMENTS SERVE ONLY TO UNDERSCORE THE NEED FOR THIS COURT TO RECONCILE ITS PRECEDENTS.

This Court's review is needed not only to resolve this conflict, but also to reconcile its precedents. As Mr. Lovitt explained in his opening brief, this case arises at the

intersection of two lines of this Court's precedents: one line holding that "all relevant evidence" is *generally* admissible at capital sentencing hearings, and another holding that a heightened standard of reliability governs such hearings. *See* Pet. 14-16. In response, the Commonwealth studiously ignores the second line of precedents, and instead relies on yet other, inapposite cases while arguing that Mr. Lovitt is "confus[ing]" different legal principles. Opp. 10. By doing so, the Commonwealth only underscores the need for this Court to clarify this important area of law.

At the outset, any confusion is the Commonwealth's, not Mr. Lovitt's. As the state supreme courts have concluded, there are two possible ways to apply the requirement of greater reliability to evidence of unadjudicated crimes. One is to exclude such evidence altogether; the other is to require the government to prove each alleged crime by a particular standard of proof before it may be considered by the jury. *See* Pet. 10-13. Either approach would require reversal of the Commonwealth's extreme rule of *per se* admissibility.

The Commonwealth argues that the first of these approaches is precluded by this Court's decision in *Williams v. New York*, 337 U.S. 241 (1949). But as Mr. Lovitt explained in his opening brief, this Court held nearly 25 years ago that the *relevant* holding of *Williams* is no longer good law. *See* Pet. 15 (citing *Gardner v. Florida*, 430 U.S. 349 (1977)). The Commonwealth claims that "*Gardner* did not overrule or question the validity of *Williams*; rather, it held *Williams* not applicable" on its facts. Opp. 14-15. Nonsense. The *Gardner* Court did "note" that *Williams* was not "directly applicable" on its facts. 430 U.S. at 356. But the Court *also* went on to hold that intervening precedents recognizing that "death is a different kind of punishment" now require the Court to "scrutinize a State's capital-sentencing procedures more closely than was necessary in 1949," "when the *Williams* case was decided." *Id.* at 357.

In addition to ignoring the relevant holding of *Gardner*, the Commonwealth claims that this Court has relied on *Williams* since *Gardner*. Opp. 15. But none of the Commonwealth's cases address the *relevant* holding of *Williams*. The first three cases cited by the Commonwealth are not even death penalty cases, and thus have no bearing on the consideration of unadjudicated crimes in *capital* sentencings. *See id.* (citing *United States v. Watts*, 519 U.S. 148 (1997); *Witte v. United States*, 515 U.S. 389 (1995); and *Nichols v. United States*, 511 U.S. 738 (1994)). It is one thing for a sentencing *judge* to hear evidence before determining the length of a *prison* term; it is quite another for a lay *jury* to hear unreliable and prejudicial evidence when deciding whether to sentence a person to *death*. Not only is it well-established that death is different, *see* Pet. 15, it is also well-established that evidentiary rules must be stricter in jury trials than in bench ones because juries are more susceptible to unreliable or prejudicial evidence. *See, e.g., Null v. Wainwright*, 508 F.2d 340, 344 (5th Cir. 1975).

The other cases relied on by the Commonwealth all cite *Williams* for other propositions, most notably the uncontroversial proposition that all relevant evidence is generally admissible at capital sentencing hearings. *See* Opp. 15 (citing *Schlup v. Delo*, 513 U.S. 298 (1995); *Dawson v. Delaware*, 503 U.S. 159 (1992); and *Payne v. Tennessee*, 501 U.S. 808 (1991)). While these are capital cases, none of them address the question whether evidence of unadjudicated criminal conduct satisfies the heightened reliability requirement. Indeed, none of them even involve unadjudicated conduct.[1] Thus, none of them have any bearing on this case.

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[1] The Commonwealth's contention that *Tuilaepa v. California*, 512 U.S. 967 (1994), sanctions consideration of unadjudicated conduct is puzzling. *See* Opp. 15. *Tuilaepa* holds that California's use of a "prior criminal activity" aggravating factor is not unconstitutionally vague; it does not address proof issues at all. *See* 512 U.S. at 976-77. Indeed, California is in *conflict* with Virginia on the latter issue. *See* Pet. 12.

In addition to claiming that *Williams* disposes of the argument that unadjudicated-crimes evidence should be excluded altogether, the Commonwealth also claims that *McMillan v. Pennsylvania*, 477 U.S. 79 (1986), precludes the argument that such evidence should at least be proven by a specific standard of proof before the jury may consider it. *See* Opp. 16. Once again, however, *McMillan* is not a capital case, and thus does not address the requirements for such cases.

The Commonwealth also contends that "[n]othing in this Court's precedents" supports the proposition that the prosecution should satisfy a burden of proof with respect to "each fact or piece of evidence." Opp. 10; *see also id.* at 16-17. Not so. First off, not just any "fact or piece of evidence" is at issue. *See* Opp. 10. Instead, this petition addresses evidence of unadjudicated *crimes*, which is especially prejudicial. *Cf.* Fed. R. Evid. 609. Such evidence has particular importance in death penalty cases because it may serve by itself to establish future dangerousness, and therefore death eligibility. This Court has recognized that even in *non-capital* cases, the government may have to prove facts beyond a reasonable doubt if they are so important as to be a "tail which wags the dog of the substantive offense." *McMillan*, 477 U.S. at 88; *see also United States v. Mergerson*, 4 F.3d 337, 343 (5th Cir. 1993). It is all the more important to ensure reliability in *capital* cases.

Requiring the government to prove unadjudicated crimes by a specified burden of proof would help to do so. As this Court has held, "careful instruction on the burden of proof" is a "traditional and appropriate means of attacking shaky but admissible evidence." *Daubert v. Merrill Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 596 (1993); *see also, e.g., Addington v. Texas*, 441 U.S. 418, 423 (1979). Thus, several state supreme courts require the government to prove unadjudicated crimes by a specific burden of proof in death cases. *See* Pet. 10, 12-13. These states' longstanding practice shows that this approach is both practical and effective at promoting reliability. Yet Virginia has persisted in applying its

extreme rule of *per se* admissibility – a rule that the great majority of states to consider the issue have rejected. Pet. 10.

III. THIS IMPORTANT QUESTION IS PROPERLY PRESENTED ON THE RECORD OF THIS CASE.

Especially given the importance of this issue, this Court should consider it now. *See* Pet. 21-23. There is no dispute that the jury heard extensive evidence of alleged criminal conduct for which Robin Lovitt was never even tried, much less convicted, and then proceeded to sentence him to death based *solely* on a finding of future dangerousness. *See id.* at 5. Nor does the Commonwealth dispute that the Supreme Court of Virginia alone has affirmed more than 25 death sentences over the past 15 years based on its rule of *per se* admissibility. *See id.* at 21. Thus, this case squarely presents an important and recurring question of federal law. Particularly given that this Court granted *certiorari* to consider a related but much less important procedural issue in *Gray v. Netherland*, 518 U.S. 152 (1996), the Court should now consider the more fundamental question presented here. *See* Pet. 22.

Nonetheless, the Commonwealth attempts to evade review by (1) insinuating that the error was not properly preserved, Opp. 11, (2) claiming that "[t]he facts are not as Lovitt represents," *id.* at 12, and (3) arguing that the error was harmless, *id.* at 13 n.2. None of these claims has merit.

The Commonwealth's waiver argument is notable because the government devotes nearly a full page to arguing that Mr. Lovitt raised this argument in "summary" fashion, Opp. 11, but never actually comes out and says that he failed to preserve the issue. The reason is apparent: Mr. Lovitt did preserve the question by bringing it "to the attention of the state court with fair precision" in both his opening and his reply brief. *See New York ex rel. Bryant v. Zimmerman*, 278 U.S. 63, 67 (1928); Pet. 8. Given that the Supreme Court of Virginia had already rejected this challenge on more than 20 prior occasions, Mr. Lovitt can hardly be faulted for not belaboring it further. *See*

Pet. 21-22. Indeed, the Commonwealth understood that Mr. Lovitt was presenting the issue – and therefore briefed it in its response brief – and the Supreme Court of Virginia likewise decided the issue in its published opinion. *See id.* at 8. The latter point alone is dispositive, because it is an "elementary rule that it is irrelevant to inquire . . . when a Federal question was raised in a court below when it appears that such question was actually considered and decided," as it was here. *Orr v. Orr*, 440 U.S. 268, 274-75 (1979) (internal quotation omitted).

Besides insinuating waiver, the Commonwealth argues that "[t]he facts are not as Lovitt represents" because the prosecution supposedly introduced "records of institutional due process hearings and findings made of punishable offenses," Opp. 12, and proved other alleged criminal conduct "beyond a reasonable doubt." *Id.* at 13. Not so. The Commonwealth introduced unadorned testimony that Mr. Lovitt had been seen in possession of weapons on multiple occasions in the past – even though it had never made any attempt to convict or otherwise punish him for those alleged felonies. *See* Pet. 6; Va. Code § 18.2-308.2. The Commonwealth also introduced records stating that Mr. Lovitt allegedly engaged in numerous other criminal acts as a juvenile or adult prisoner. *See* Pet. 6. Once again, however, the Commonwealth never made any attempt to convict Mr. Lovitt for those alleged acts, even though they are all crimes, and several of them are felonies.[2]

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[2] *See, e.g.*, Va. Code § 18.2-308.2 (felony for convicted felon to transport concealed weapons); Va. Code § 53.1-203 (felony for prisoner to make or possess weapons or controlled substances); Va. Code § 18.2-55 (felony for prisoner to assault prison employee); Va. Code § 18.2-57 (misdemeanor to commit assault and battery); Va. Code § 18.2-96 (misdemeanor to commit petit larceny); Va. Code § 18.2-477.2 (misdemeanor for juvenile detainee to assault employee of detention center); Va. Code § 18.2-416 (misdemeanor to use violent abusive language); Va. Code § 18.2-251.01 (crime for convicted felon not to enter treatment program after he has been determined to have substance abuse problem).

Instead, the Commonwealth makes much of its claim that Mr. Lovitt supposedly received an "institutional due process" hearing on each of the juvenile detention and prison incidents. *See* Opp. 12-13. This argument fails for three reasons. *First*, even on its own terms, the Commonwealth's contention does nothing to diminish the fact that Mr. Lovitt received no hearing at all on the other incidents, including the weapons-possession incidents. *Second*, a number of the records introduced in evidence reflect only a complainant's allegations; they were never submitted to any hearing, and never led to any discipline. *See, e.g.*, Va. J.A. 2021-26. *Third*, even with respect to those incidents that received some prior hearing, "[p]rison disciplinary proceedings are not part of a criminal prosecution, and the full panoply of rights due a defendant in such proceedings does not apply." *Wolff v. McDonnell*, 418 U.S. 539, 556 (1974). Indeed, inmates do not even have the fundamental right to confront the witnesses against them. *See id.* at 567-68. Thus, such hearings do not even attempt to ensure the reliability required for *judicial* purposes, especially *death penalty* purposes.

The Commonwealth is therefore left arguing, in a footnote, that the admission of this evidence was "harmless beyond any reasonable doubt" because the jury also heard evidence that Mr. Lovitt had been convicted of other crimes. Opp. 13 n.2.[3] As explained in Mr. Lovitt's opening brief, and not disputed by the Commonwealth, the harmlessness standard is stringent in this context: reversal is required as long as the death sentence "might" have been influenced by the extensive evidence of unadjudicated crimes. *See, e.g., Arizona v. Fulminante*, 499

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[3] Although the Commonwealth also claims that it "[o]bviously" proved each of the incidents beyond a reasonable doubt, Opp. 13, that contention is both irrelevant and wrong. It is irrelevant because this evidence should not have been admitted at all. It is wrong because with respect to some instances the Commonwealth presented only the unsubstantiated testimony of a single witness, and with respect to the others the Commonwealth relied entirely on hearsay records. *See* Pet. 6-7.

U.S. 279, 302 (1991); Pet. 23. In this case, the Commonwealth presented significantly more evidence of unadjudicated crimes than of adjudicated ones. If believed, this unadjudicated conduct – including assault and battery and possession and manufacture of dangerous weapons – had at least as great a tendency to show future dangerousness, if not more, than the adjudicated conduct, which included petit larceny and possession of marijuana. Presumably for that reason, the Commonwealth not only presented extensive evidence of unadjudicated conduct at trial, but also relied on it heavily during closing argument. *See* Pet. 6-7, 22-23. Having placed so much weight on this evidence before the jury, the Commonwealth can hardly be heard to claim that there is no possibility that it influenced the jury.[4] Accordingly, this important question, on which the courts are divided, is squarely presented on the record of this case.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for writ of *certiorari*.

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[4] The harmfulness of this error is further confirmed by the extraordinary result in this case. As Mr. Lovitt explained in his opening brief, Virginia has never executed a person for committing murder during a theft when, as here, there was no evidence that the assailant intended to confront a victim or brought a weapon to the scene. *See* Pet. 23-24. The Commonwealth claims that this point is "ludicrous" because Mr. Lovitt supposedly knew "where the money, scissors and manager were when he planed his robbery and planned to leave no witnesses." Opp. 20 n.6. Significantly, the Commonwealth cites *no* evidence for that allegation, and there is none. The government also claims that *Correll v. Commonwealth*, 352 S.E.2d 352 (Va. 1987), is to the contrary, but that case involved a kidnapping, where the defendant necessarily intended to confront the victim and also told his co-defendants to bring a weapon to the scene. *See id.* at 354. The Commonwealth's willingness to make up facts in this Court serves only to underscore the extraordinary nature of Mr. Lovitt's death sentence, and the likelihood that the unadjudicated crimes evidence made the difference between life and death.

Respectfully submitted,

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